IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CRIMINAL APPEALLTE JURISDICTION.

CRIMINAL APPEAL NO. 868 OF 2000

1)Narayan Abu Ambavale,
2)Devidas Keshav Tungatkar
3)Aba Ganpat Tungatkar
4)Dilip Chandrakant Renuse..... .... Appellants.
(Orig.Accd.Nos.2,3,5 & 6)

V/s

1)The State of Maharashtra
2)Mrs.Asha Bhimaji Malekar..... .... Respondents.

Mr.M.S.Mohite, Adv. For appellant Nos. 1 and 4.

Mrs.Reveta Mohite-Dere with Mrs.S.Chaudhary for appellants 2 & 3.

Dr.F.R.Shaikh, APP for the State.

None for respondent No.2.

CORAM: V.G. PALSHIKAR
AND
SMT.NISHITA MHATRE, J.

4th Oct., 2006.

ORAL JUDGMENT: (Per Palshikar, J.)

Being aggrieved by the judgment and order of conviction and sentence passed by the learned II Additional Sessions Judge, Satara in Sessions Case No.20 of 1998 on 11.10.2000 the appellants-accused have preferred this appeal on the grounds mentioned in the memo of appeal as also verbally canvassed before us.

2. With the assistance of the learned Advocates for the appellants as also the learned Public Prosecutor we have scrutinized the entire evidence and reappreciated the same.

3. The prosecution story stated briefly is that on 2.10.1997 Bhimaji Malekar was serving as a conductor in an S.T. bus bearing No.MH-12/3371 which was plying from Bhor Mira to Mira Bhor. Pandurang Dhanavade was the driver. Said bus left at about 4.00 p.m. and reached Mira around 5.45 p.m. and again left Mira around at 6.15 p.m. On the way it halted at all stops including at Shirwal. After leaving Shirwal at about 7.15 when Bhimaji was issuing tickets to passengers bus reached near Shindewadi diversion where some passengers entered in bus. After proceeding about half kilometer from Shindewadi diversion, the driver Pandurang hearing some commotion stopped the bus and looked back when he saw that Bhimaji was being attacked by some assailants with knife, chopper and words. Pandurang was also slapped. Pandurang then jumped out of the bus and started running towards Shindewadi. The assailants then boarded the jeep standing there and went away. When driver Pandurang came back he found that other passengers had left and Bhimaji was lying in pool of blood. Hence he went to Shirwal out post and lodged a complaint. This complaint was investigated by the police. The accused were arrested and charge sheeted. The prosecution examined 15 witnesses to prove

its case and the learned trial Judge by the impugned order convicted the original accused Nos.2, 3, 5 and 6 under section 302 read with section 149 of Indian Penal Code and sentenced them to suffer imprisonment for life. These accused persons therefore have preferred the above appeal.

4. Learned counsel appearing on behalf of the appellants submitted that the trial Judge for convicting the accused as aforesaid has used the following things as fact findings; (i) the learned Judge appreciated and accepted the eye witness account of P.Ws. 6 and 7; (ii) the jeep used by accused was seized by the police which had blood stains on its seat; (iii) the clothes of the accused were recovered at the instance of the accused; (iv) the previous enmity was proved and therefore the learned trial Judge recorded the order of conviction. According to the learned counsel these circumstances were grossly inadequate. Eye witness account was wholly untrustworthy. He pointed out several contradictions, omissions and improvements that were existing in the evidence. According to him, several independent witnesses could have been examined had the investigation been properly done because the assault took place in the presence of several persons who were passengers in the bus. The police did not try hard enough to locate those passengers.

5. According to the learned counsel the testimony of P.W.7-Laxman

is liable to be rejected as his conduct is wholly unnatural. He claims to be eye witness. He claims that he saw the victim lying injured. He was closely related to the victim, yet he coolly got off the bus and went away home. He did not inform anybody. He did not inform even his wife who was sister of the victim. According to him P.Ws. 6 and 7 who claim to be eye witnesses have not stated in the Court that the accused persons under trial sitting in the Court were the persons whom they had identified in the identification parade. According to him therefore the learned trial Judge erred in convicting the accused.

6. These submissions were countered by the learned Additional Public Prosecutor who submitted that the eye witness account was trustworthy. Contradictions, omissions, if any, are not such as would affect the credibility of the witnesses. The testimony of these two witnesses is thread of truth and therefore the conviction is proper. According to the learned public prosecutor the jeep used by the accused was found blood stained, their clothes were found blood stained and therefore the conviction is proper.

7. We have to consider these rival submissions in the light of the evidence as reappreciated by us. P.W.1-Sanjay is panch witness who was declared hostile by the prosecution and therefore the panchnama made by him was proved by the Investigating Officer. Even otherwise his testimony is inconsequential. P.W.2-Pandurang Kale was the

Executive Magistrate at the relevant time and he held the test identification parade. He has deposed how he conducted it and how identifications were effected by the witnesses. P.W.3-Baban Vani is another Executive Magistrate who again held test identification parade and he has deposed how he conducted the parade and what was the result thereof. Here it is liable to be noted that both the eye witnesses repeatedly state in their deposition that they knew the accused persons as the accused persons are also residents of the same village. If this is the fact there was no propriety for holding identification parade twice, assuming that it was felt necessary. Only four persons have been successfully identified by the witnesses. Those four have been convicted by the trial Court. It will be seen that these very witnesses have failed to identify eleven others who were prosecuted. These eye witnesses also failed to state in the Court that the accused sitting in the Court are the persons who committed the assault. In such circumstances the testimony of these two witnesses is of no consequence. P.W.4-Vilas Petkar has proved the map of spot. The fact that the assault did take place in the bus cannot be disputed. His evidence is of no further value. P.W.5-Nandkumar was given up in the Court after being discharged. P.W.6-Pandurang is the first eye witness. He was driver of the bus in which the assault took place. The deceased was conductor of the bus. He gave account of political

rivalry existing amongst them when they were residing at Bare Budruk. On 2.10.1997 he and the deceased were working in MSRDC and were plying the bus between Bhor and Mira villages. He then deposes what exactly happened when the bus started after 5.00 p.m. He says that the assault took place. The assault was managed by the accused persons. He does not forget to mention that the lights in the bus were on because the conductor was distributing the tickets and then he goes on describing which accused had what weapon and how it was used.

8. The statement of this witness is liable to be scrutinized very carefully. He speaks that there was a sheet behind the driver's seat. If that is correct he could not have seen anything. It is possible that he referred to the grill as sheet. Factually there was a grill as will be seen from the photograph of the bus and therefore he could see the assault. The witness then states how the assault took place, how he was slapped and how he ran away from the spot. He then says that he took a ride in the jeep and went to Shirwal out post to narrate the story to the police as he saw. Surprisingly he does not say a word as to what happened to any inmate of the jeep. Natural reaction of a person who has seen such grave violence would be to tell happenings of such incident to first available individual. His keeping quiet in the jeep is unnatural to say the least.

9. P.w.7-Laxman is the other witness who claims to be eye witness.

He also has deposed about the entire incident and the manner in which the assault took place and when the bus stopped he got down from the bus walked to home and thereafter did not tell about same incident to anybody including his wife whose brother was assaulted. This conduct is definitely strange. It is not possible for us to believe that a man who sees murderous assault of his relation would keep quiet about it and or would not immediately try and render help to the victim and go away coolly and forget the incident till he is interrogated by the police. We will discuss the evidence of these two witnesses again at a later stage. P.Ws.8, 9, 10 and 11 are panch witnesses and they have all turned hostile. P.W.12-Akhatar Mujawar is the panch witness to the recovery of weapon and he also is declared hostile. The prosecution therefore has to rely on testimony of P.W.15-Ramchandra Pathare, the investigating officer who speaks about this panchnama being executed. Independent corroboration of the fact that the investigating officer did record this panchnama is therefore lacking in relation to all the panchnamas. P.W.13-Balekhan Mulani is the police constable who recorded First Information Report of P.W.6-Pandurang. P.W.14-Dr.Ramesh Thorat is the doctor who conducted the post mortem. P.W.15-Ramchandra Pathare is the investigating officer. This in totality is the evidence which according to learned trial Judge was enough to warrant conviction of four accused persons. According to us,

what has been proved by the prosecution is that the assault did take place in the bus, that the blood stained jeep was recovered and certain blood stained clothes were recovered. There is no evidence whatsoever to connect the accused persons to that evidence. The recovery panchnamas are proved by the Investigating Officer. The panchas who were witnesses to it have turned hostile. In such circumstances the corroborative value of these documents is further reduced.

10. That takes us back to the evidence of P.Ws. 6 & 7. We feel it unsafe to rely on the evidence of these eye witnesses because of variety of reasons. P.W. is driver of the bus. He claims that he saw the assault, got down, sat in a jeep and went to police station to report but did not disclose the matter to the inmates of that jeep which is unnatural on the part of a normal human being. Still more unnatural is the conduct of an employee, who is entrusted with a bus belonging to MSRDC, not reporting the assault and the whereabouts of the bus to his employer-Corporation. Rules of the Corporation would so require. Yet he does not inform the Corporation or the Depot Manager or any other responsible officer of the event which has taken place before his eyes. It is difficult for us to believe in such circumstances that he really saw the assault. In all probability the moment he heard shouts “yana mara” he jumped out of the driver's cabin and ran away. Even

assuming that he saw it, it is difficult to imagine how he could pinpoint everybody named by him in the identification parade, attribute specific role to each of them.

11. There is yet another reason for not accepting the evidence of this witness. He has taken care to state in his examination in chief as to how he could see the event though it was night time and he therefore says that lights in the bus were on as the Conductor was issuing tickets. Exhibit 122 is panchnama of scene of offence in which interior of the bus is described from where blood stains were recovered, blood stained seats were recovered and noted. This panchnama nowhere mentions that at that time the lights in the bus were on. The incident is of 2.10.1997 and the panchnama is executed on 3.10.1997. There is no evidence that the bus was in any manner operative. The fact therefore if the lights were on when the incident took place they would remain on when the panchnama took place. This testimony of the witness that the lights were on is therefore not corroborated by the panchnama of the vehicle Ex.122 proved by the Investigating Officer. We attach importance to this omissions because the witness has taken care to mention that the lights were on but for which he could not have seen the assault at all. The possibility of there being dark and the witness running away after hearing commotion “yana mara” cannot be over ruled. A reasonable doubt therefore arises as to the presence of

this man as an eye witness to the incident. Assuming further that there was light and he did see something it is impossible to believe that he would be able to give such a cryptic description of the assault and then forget to mention about it to anybody but the police. For all these reasons we are unable to accept the ocular testimony of P.W.6.

12. P.W.7 states that he was i the bus when the assault took place. He states that the victim was brother of his wife. He further says that after the assault he was frightened and ran away from the place and went home. He does not tell about the assault on victim to his wife whose brother the victim was assaulted. He does not tell it to anybody. As noted earlier this conduct is highly unnatural. It sounds improbable that the normal human being would act in such manner and would not give any help to a relation who is severely assaulted. Therefore a reasonable doubt arises as to whether he is really an eye witness or has been put up by the prosecution to lend credence to the deposition of P.W.6. The conduct of the witness renders his testimony unbelievable. We therefore cannot accept his statement as an honest eye witness.

13. If the eye witness account is discarded then only the circumstantial evidence which remains on record is the recovery of certain clothes stained with blood, recovery of certain weapons which are not proved by panchnama, recovery of jeep with blood stains and

these circumstances, in our opinion, are grossly inadequate to warrant conviction. In our opinion the learned trial Judge committed an error in relying on ocular testimony of P.Ws. 6 and 7 in the face of these infirmities existing there. We are unable to accept his findings in this regard. In the result, therefore, the appeal succeeds and is allowed. The impugned order of conviction and sentence is set aside. Appellants-accused Narayan Abu Ambavale, Devidas Keshav Tungatkar, Aba Ganpat Tungatkar, Dilip Chandrakant Renuse Original accused Nos. 2, 3 5 and 6 are in jail. They are liable to be released forthwith if not required otherwise.